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NO. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HERMAN S. SOLEM, WARDEN,
SOUTH DAKOTA STATE PENITENTIARY; and
MARK V. MEIERHENRY, ATTORNEY GENERAL,
STATE OF SOUTH DAKOTA,

Petitioners,

v.

JOHN BARTLETT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether the opening of land within the original Cheyenne River Reservation to settlement by non-Indians through the Act of May 29, 1908, 35 Stat. 460, diminished the original reservation so as to confer criminal jurisdiction within the opened area upon the State of South Dakota?

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Solem and Meierhenry and Respondent Bartlett have been the parties to this action in both the District Court and the Court of Appeals. The Petitioners represent the State of South Dakota, and will hereinafter be referred to as "State." Respondent Bartlett will be referred to as "Bartlett." In addition to the above-named parties to the action, the following groups have a particular interest in the resolution of the question presented in this Petition:

a. Dewey, Corson and Ziebach Counties, South Dakota, and Sioux County, North Dakota;

b. Cheyenne River Sioux Tribe and Standing Rock Sioux Tribe; and

c. United States of America.

All of these groups were involved in the proceedings in the Court of Appeals as amicus curiae.

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OPINIONS BELOW

The decision of the United States District Court for the District of South Dakota is unreported. That decision, dated April 19, 1982, appears in the Appendix (Appendix A, pp. A1-A8). The District Court's Order dated April 19, 1982, appears in the Appendix (Appendix M, pp. A96-A97). The opinion of the United States Court of Appeals for the Eighth Circuit is reported at the following citation: Bartlett v. Solem, 691 F.2d 420 (8th Cir. 1982) (en banc). The opinion of the Court of Appeals also appears in the Appendix (Appendix B, pp. A9-A12). The Judgment of the Court of Appeals, dated October 27, 1982, appears in the Appendix (Appendix N, pp. A98-A99).

NO. 82-

IN THE

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OCTOBER TERM, 1982

HERMAN S. SOLEM, WARDEN,
SOUTH DAKOTA STATE PENITENTIARY; and
MARK V. MEIERHENRY, ATTORNEY GENERAL,
STATE OF SOUTH DAKOTA,

Petitioners,

v.

JOHN BARTLETT,

Respondent.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on October 27, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The term "Indian Country" is defined in 18 U.S.C. § 1151. That section is set forth in the Appendix (Appendix C, p. A13).

The western portion of the original Cheyenne River Reservation was opened to settlement by non-Indians by the Act of May 29, 1908, 35 Stat. 460. Hereinafter the Act of May 29, 1908, will be referred to as "1908 Act." The 1908 Act is set forth in the Appendix (Appendix D, pp. A14-A29). The 1908 Act was amended by the Act of February 17, 1910, 36 Stat. 196. The Act of February 17, 1910, is set forth in the Appendix (Appendix L, pp. A92-A95).

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

On April 24, 1979, Bartlett pleaded guilty to attempted rape in a South Dakota state court in Dewey County, South Dakota. Bartlett is an enrolled member of the Cheyenne River Sioux Tribe. The crime took place in Eagle Butte,

Dewey County, South Dakota. The exact location of the crime is as follows: Lot 12, Block 16 of the Milwaukee Land Company's First Addition to the town now City of Eagle Butte, South Dakota, located in the NW 1/4, SW 1/4 of Section 17, Township 12 North, Range 24 East of the Black Hills Meridian, Dewey County, South Dakota. This land was patented to T.C. Sherman on November 17, 1910, by the United States government and now is non-trust property owned by Vernon Anderson, a non-Indian. This land is within the confines of the original Cheyenne River Reservation created by the Act of March 2, 1889, 25 Stat. 888. It is also within the portion of the Cheyenne River Reservation opened to settlement by the 1908 Act.

A map illustrating the portions of Corson, Dewey and Ziebach Counties, South Dakota, which were opened to settlement by the 1908 Act appears in the Appendix (Appendix E, p. A30).

B. PROCEDURAL HISTORY

On February 9, 1982, Bartlett filed a petition for a Writ of Habeas Corpus in United States District Court for the District of South Dakota. Bartlett's petition appears in the Appendix (Appendix G, pp. A32-A42).

In his petition, Bartlett claimed that his plea of guilty in state court to an attempted rape charge was invalid because he committed the crime in "Indian Country," as that term is defined in 18 U.S.C. § 1151. According to Bartlett, because the crime was committed in Indian Country, the state court system had no jurisdiction over him or the crime he committed. The United States District Court for the District of South Dakota considered the matter on the written record. The District Court's Memorandum Opinion, dated April 19, 1982, granted Bartlett's petition, concluded that the 1908 Act did not diminish the Cheyenne River Reservation and that the state

lacked criminal jurisdiction over the location of the crime committed by Bartlett.[1]

Bartlett's original action in the United States District Court for the District of South Dakota was brought under the provisions of 28 U.S.C. § 2254. The District Court had jurisdiction under the provisions of 28 U.S.C. § 2254. Notice of Appeal to the United States Court of Appeals for the Eighth Circuit was filed on May 11, 1982. The Notice of Appeal was filed within the thirty (30) days allowed by Rule 4(a)(1) of the Federal Rules of Appellate Procedure.

On June 30, 1982, The State filed a Petition Suggesting Hearing En Banc before the Court of

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[1] The process of redrawing the boundaries of an Indian reservation which has been opened to settlement has been described as "termination," "diminishment," and "disestablishment." These terms are interchangeable. See, United States v. Dupris, 612 F.2d 319, 320 n. 3 (8th Cir. 1979); South Dakota v. Janis, 317 N.W.2d 133, 134 n. 1 (S.D. 1982). Throughout this Petition, the process will be referred to as "diminishment."

Appeals. On July 30, 1982, the petition was granted. An en banc argument before the Court of Appeals was held on September 15, 1982, in St. Paul, Minnesota. The decision by the Court of Appeals, dated October 27, 1982, affirmed the decision of the District Court. The Court of Appeals had jurisdiction of the appeal under the provisions of 28 U.S.C. § 1291.

I

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH A STATE COURT OF LAST RESORT.

Since 1973, the South Dakota Supreme Court has twice ruled on the question presented in this Petition.[2] Stankey v. Waddell, 256 N.W.2d 117

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[2] The South Dakota Supreme Court is the court of the last resort in the State of South Dakota. The question presented in this Petition involves the interpretation of an Act of Congress, which makes the question presented to this Court a federal question.

(S.D. 1977); South Dakota v. Janis, 317 N.W.2d 133 (S.D. 1982). In both of these decisions, the court found that the area of the Cheyenne River Reservation opened to settlement by the 1908 Act was no longer part of the Cheyenne River Reservation, and that the State of South Dakota has jurisdiction in that area.[3]

By contrast, the most recent decisions of the United States Court of Appeals for the Eighth Circuit, including the present action, have concluded that the area opened to settlement is still part of the original Cheyenne River Reservation. United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973) [hereinafter referred to

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[3] The 1908 Act opened not only a portion of the Cheyenne River Reservation to settlement by non-Indians, but also a portion of the Standing Rock Reservation. That reservation is located in Corson County, South Dakota and Sioux County, North Dakota. Because of the location of the offense committed by Bartlett, the jurisdictional status of the Standing Rock Reservation is not directly at question in this action.

as "Erickson"]; United States v. A Juvenile, 453 F.Supp. 1171 (D.S.D. 1979), rev'd sub nom., United States v. Dupris, 612 F.2d 319 (8th Cir. 1979); vacated and remanded, 446 U.S. 980 (1980).

Because the decisions of the South Dakota Supreme Court and the United States Court of Appeals for the Eighth Circuit are in direct conflict on the same issue of law, this Court

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The United States Court of Appeals for the Eighth Circuit has decided that Congress did not intend to diminish the eastern portion of the Standing Rock Reservation, which was opened to settlement by the Act of February 14, 1913, 37 Stat. 675. United States v. Long Elk, 565 F.2d 1032 (8th Cir. 1977). The jurisdictional status of the eastern portion of Standing Rock Reservation is also not at question in this action.

The State also acknowledges that the federal and tribal governments have exclusive jurisdiction over Indian activities on those portions of the original reservation which were restored to reservation status pursuant to 25 U.S.C. § 467, and on Indian allotments presently held in trust. 18 U.S.C. § 1151. Further, the State does not question the continued extension of federal services to tribal members residing within the area in question. See, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 615-616 n. 48 (1977)

should grant the State's Petition in order to review the question presented herein.[4]

II

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The question presented in this Petition involves the jurisdictional status of the lands within the Cheyenne River Reservation which

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[4] This Court's decision in DeCoteau v. District County Court, 420 U.S. 425 (1975), presented a procedural situation similar to that found in this Petition. A conflict existed between the South Dakota Supreme Court and the United States Court of Appeals for the Eighth Circuit concerning the interpretation of an Act of Congress, Act of March 3, 1891, 26 Stat. 989, which opened reservation land in South Dakota to settlement by non-Indians. In DeCoteau v. District County Court, 87 S.D. 555, 211 N.W.2d 843 (1973), the South Dakota Supreme Court held that the opening of the land to settlement in 1891 diminished the Lake Traverse Reservation. The Court of Appeals came to the opposite conclusion in United States ex rel. Feather v. Erickson, 489 F.2d 99 (8th Cir. 1973). This Court granted certiorari to resolve the conflict. This Court affirmed the South Dakota Supreme Court's decision. DeCoteau, 420 U.S. at 449.

were opened to settlement by the 1908 Act.[5] This Court has already faced the question of whether an Act of Congress was intended to diminish other Sioux Indian Reservations in South Dakota.

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[5] The 1908 Act is part of a series of acts of Congress which opened Indian reservation land to settlement by non-Indians. The Acts within this series are often referred to as Surplus Lands Act. In addition to the 1908 Act, which opened the Cheyenne River and Standing Rock Reservations to settlement, several other Acts opened the other Sioux Indian Reservations in South Dakota to settlement by non-Indians. These Surplus Lands Acts are specific acts which effectuated the general policy guidelines set forth in the General Allotment Act of 1887, 24 Stat. 388, commonly referred to as the Dawes Act. Portions of both the Rosebud and Pine Ridge Reservations in South Dakota were opened to settlement by specific Surplus Lands Acts. The Rosebud Reservation was opened by the following series of acts: Act of April 23, 1904, 33 Stat. 254; Act of March 2, 1907, 34 Stat. 1240; and Act of May 30, 1910, 36 Stat. 448. The Pine Ridge Reservation was opened by the Act of May 27, 1910, 36 Stat. 440. These acts appear in the Appendix as follows: Act of April 23, 1904, Appendix H, pp. A43-A53; Act of March 2, 1907, Appendix I, pp. A54-A63; Act of May 30, 1910, Appendix J, pp. A64-A77; and Act of May 27, 1910, Appendix K, pp. A78-A91.

DeCoteau v. District County Court, 420 U.S. 425 (1975); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977).

The importance of any diminishment decision is clear. A certain area must either lie within the jurisdiction of the state courts or within the jurisdiction of the federal courts. The determination is important to the general public and essential for law enforcement personnel.

A review of the legal history of the area in question illustrates the need for a decision by this Court on the diminishment issue presented in this Petition. In Erickson, the Court of Appeals reversed a legal determination that existed for over sixty years. That determination, originally set forth in United States v. LaPlant, 200 F. 92 (D.S.D. 1911), stated that South Dakota's state courts had criminal jurisdiction within the area of

the Cheyenne River Reservation opened to settlement by the 1908 Act. One of the later federal court decisions which implicitly approved the existence of this state court jurisdiction was United States ex rel. Miner v. Erickson, 428 F.2d 623 (8th Cir. 1970). In that decision, the United States Court of Appeals for the Eighth Circuit, through Circuit Judge Blackmun, refused to grant habeas corpus relief to a prisoner convicted in a South Dakota state court for a crime committed in Eagle Butte, South Dakota, which is also the site of the crime committed by Bartlett.

Since the Erickson decision in 1973, several other decisions dealing with the same opened area of the same Reservation have been announced by both state and federal courts. United States v. Dupris, supra; South Dakota v. Janis, supra; and Stankey v. Waddell, supra. The existence of these conflicting federal and state court decisions highlights the need for a decision by this Court.

Until a decision is rendered by this Court, the question presented in this Petition will continue to be raised in the state and lower federal courts. Without a decision by this Court there will be no final resolution of the question, thereby continuing the jurisdictional quagmire that presently exists within the original boundaries of the Cheyenne River Reservation.

Several recent cases have presented diminishment questions to this Court. See, State v. Clark, 282 N.W.2d 902 (Minn. 1979), cert. denied, 445 U.S. 904 (1980); Red Lake Band of Chippewa Indians v. State of Minnesota, 614 F.2d 1161 (8th Cir. 1980), cert. denied, 449 U.S. 905 (1981) (Blackmun, J., dissenting); Russ v. Wilkins, 410 F.Supp. 579 (N.D. Cal. 1976), rev'd, 624 F.2d 914 (9th Cir. 1980), cert. denied, 451 U.S. 908 (1981); and Polson v. Confederated Salish and Kootenai Tribes, 665 F.2d 951 (9th Cir. 1982), cert. denied, ___ U.S. ___, 51 U.S.L.W. 3330 (November 2, 1982).

In each one of these cases, certiorari was denied. However, several factors differentiate the matter presented in this Petition from the above-cited cases. Most importantly, none of these other decisions present a direct conflict between a state court and a federal court such as is presented in this matter. Additionally, in this action, the State is seeking to reassert state criminal jurisdiction over the land opened to settlement by one of the Surplus Lands Acts passed by Congress in the early 1900's.

Because of the conflict between the state and the federal courts on the issue of jurisdiction within the opened portion of the Cheyenne River Reservation, the practical problems involved in providing effective law enforcement in this area are great. Both the state and federal governments have a very strong interest in knowing whether prisoners in their respective prisons are properly incarcerated. Under the present situation involving the conflict between the state and

federal courts over jurisdiction on the original Cheyenne River Reservation, prisoners are being set free on technicalities involving merely jurisdictional grounds. Until a final determination is made, these law enforcement problems will continue to exist. The question presented in this Petition is one of exceptional importance to the State of South Dakota, the affected counties, the Cheyenne River and Standing Rock Sioux Tribes, and the general public living within the area in question. The jurisdictional question presented herein should be heard and decided by this Court.

III

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

Recently, the South Dakota Supreme Court reviewed the development of the decisions of this Court in the diminishment area. After studying

recent diminishment decisions of this Court -- Seymour v. Superintendent, 386 U.S. 351 (1962); Puyallup Tribe v. Department of Game of the State of Washington, 433 U.S. 165 (1977); Mattz v. Arnett, 412 U.S. 481 (1972); and Rosebud Sioux Tribe v. Kneip, supra--the court reached the following conclusion:

> A comparison of these four cases reveals that; (1) opening a reservation alone does not diminish its boundaries, but, does create an inherent ambiguity regarding jurisdiction over opened lands, (2) ambiguity is resolved by a searching inquiry into the legislative intent evidenced in the Act itself, its legislative history, the historical and surrounding circumstances of its promulgation, and jurisdictional treatment of the area, and (3) an equivocal legislative intent preponderates against termination.

South Dakota v. Janis, supra at 136-137. The Court of Appeals' decision in this action fails to take the factors delineated in these decisions into account.

The decisions of both the District Court and the Court of Appeals rely on the Court of Appeals'

earlier decisions in Erickson, supra and Dupris, supra. The heaviest reliance is placed on Erickson.[6] Erickson, however, was decided prior to this Court's decisions in Rosebud Sioux Tribe, supra; DeCoteau, supra; and Puyallup Tribe, supra. Therefore the Court of Appeals' reliance upon Erickson is questionable. By relying on Erickson, the Court of Appeals failed to fully examine the factors set forth in the recent decisions of this Court dealing with the diminishment question.

Without fully arguing the merits of this action, the State cites several examples to illustrate the inconsistencies between Erickson and the applicable decisions of this Court:

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[6] Any reliance by the Court of Appeals on their Dupris decision as binding precedent is misplaced. This Court summarily granted certiorari, vacated their judgment and remanded it on mootness. Dupris v. United States, 446 U.S. 980 (1980). This action stripped the Court of Appeals' decision in Dupris of its precedential weight. See, South Dakota v. Janis, supra at 137-138; County of Los Angeles v. Davis, 440 U.S. 625, 634 n. 6 (1979).

A. Language in section 2 of the 1908 Act specifically describes the land not opened to settlement as the "reservation thus diminished." Appendix D, A17-A19. Compare, Appendix J, p. A65 (language in 1910 Rosebud Act describing the land not opened to non-Indian settlement as "the diminished reservation"); and Appendix K, p. A79 (language in 1910 Pine Ridge Act describing the land not opened to non-Indian settlement as "the diminished reservation"). This language is evidence of an intent to diminish the reservation. See, DeCoteau, 420 U.S. at 446-447; Rosebud Sioux Tribe v. Kneip, 521 F.2d 87, 99 (8th Cir. 1975); and United States ex rel. Cook v. Parkinson, supra, at 123. Language in section 9 of the 1908 Act explicitly returns the opened lands in the

Cheyenne River Reservation to the public domain. Appendix D, pp. A27-29. The Erickson court rejected this language.

B. Section 7 of the 1908 Act reserves sections 16 and 36 of each township in the opened area, and grants them to the states in which they are located "for the use of common schools." Appendix D, pp. A25-26. This Court reviewed similar language in the acts opening the Rosebud Reservation in Rosebud Sioux Tribe v. Kneip, supra. Appendix J, pp. A74-A75. After such review, this Court concluded that such language is strong evidence of diminishment. Rosebud Sioux Tribe, 430 U.S. at 599-601. The Erickson court erroneously minimized the importance of this language.

C. The Act of February 17, 1910, 36 Stat. 196, amended section 8 of the 1908 Act. These amendments prohibited the introduction of intoxicating beverages into the area opened by the 1908 Act. Appendix L, pp. A94-95. Identical provisions are found in the acts which opened the Rosebud Reservation to settlement. Appendix J, p. A76. This Court found these provisions to be an expression of intent to diminish the original reservation. Rosebud Sioux Tribe, 430 U.S. at 613-615. The Erickson court found this evidence to be without merit.

D. In the time between the federal court decisions in LaPlant, supra, and Erickson, both the federal and state courts consistently determined that the opened portion of the original reserva-

tion was within the jurisdiction of the State of South Dakota. The State of South Dakota had exercised this jurisdiction, yet the Court of Appeals did not find this exercise useful in the resolution of the question presented.

E. The reports of Inspector James McLaughlin, who dealt with the Cheyenne River and Standing Rock Sioux Tribes in regard to the opening of the lands by the 1908 Act, illustrate the contemporaneous interpretation of the words of the 1908 Act, as they were understood by the parties to the negotiations. See, Stankey v. Waddell, supra at 122-126; South Dakota v. Janis, supra at 137; United States v. A Juvenile, supra at 1176-1188; United States v. Dupris, supra at 329-331 (McMillian, J., dissenting). The Court

of Appeals in Erickson used this material sparingly.

F. The Erickson court ignored the historical context surrounding the passage of the 1908 Act. A comparison of the language and legislative history of the 1908 Act with that of the acts which opened both the Rosebud and Pine Ridge Reservations, reveals that there are no significant differences in the statutes. In addition to the similarities in the language contained within these acts, the sponsors of the acts in Congress were the same. See, Dupris, supra at 326 n. 4 (McMillian, J., dissenting). Moreover, Inspector McLaughlin, in addition to dealing with the Cheyenne River and Standing Rock Sioux Tribes, also dealt with the Indians on both the Rosebud Reservation and the Pine Ridge Reservation

prior to the opening of those reservations to settlement by non-Indians. See, Dupris, supra at 326 n. 5 (McMillian, J., dissenting). See also, Appendix F, p. A31, which is a map of the State of South Dakota illustrating the status of the reservations in the State opened to non-Indian settlement in the late 1800's and early 1900's, including those reservations in western South Dakota where I spector McLaughlin was involved in negotiations with the respective tribes. These similarities are a strong indication of the identity of purpose among the acts. The decisions of this Court note the similarities between the acts opening reservations to settlement, and recognize that these similarities are evidence of diminishment. See, Rosebud Sioux Tribe, 430 U.S. at 608-609, 612-613; DeCoteau,

420 U.S. at 446. See also, United States ex rel. Cook v. Parkinson, supra at 123. Yet, the Erickson court ignored strong historical evidence of an intent to diminish that is contained within the passage of the other Acts of Congress which opened other Sioux Indian Reservations in South Dakota to settlement by non-Indians.

The application of the diminishment decisions of this Court to the factors set forth directly above clearly illustrates that the United States Court of Appeals for the Eighth Circuit has decided a federal question in a way which conflicts with the applicable decisions of this Court. For that reason the State's Petition should be granted.

CONCLUSION

Based on the foregoing arguments and authorities, Petitioners Herman S. Solem, Warden,

South Dakota State Penitentiary, and Mark V. Meierhenry, Attorney General for the State of South Dakota, pray that their Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

April 19, 1982

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RE: CIVIL NO. 82-3009
JOHN BARTLETT, Petitioner vs.
HERMAN S. SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, AND MARK V. MEIERHENRY, ATTORNEY GENERAL, STATE OF SOUTH DAKOTA, Respondents.

Gentlemen: MEMORANDUM OPINION

CASE SUMMARY

Petitioner filed this application for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, alleging that the crime for which he was convicted in state court occurred in "Indian country" as defined in 18 U.S.C. § 1151 and, therefore, the

state lacked jurisdiction to prosecute him. For the reasons which follow, petitioner's application for writ of habeas corpus is granted.

FACTUAL BACKGROUND

Petitioner, an enrolled member of the Cheyenne River Sioux Tribe, entered a plea of guilty in state court to a charge of attempted rape.[1] The crime occurred within the original

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[1] Petitioner's request for state post-conviction relief, pursuant to SDCL 23A-34, was denied on December 1, 1981, by Judge Scott C. Moses, presiding judge of the Eighth Judicial Circuit. The record does not reflect whether petitioner sought a certificate of probable cause, pursuant to SDCL 23A-34-20, to appeal Judge Moses' decision to the State Supreme Court. The State, however, admits in its answer, that petitioner has exhausted all available state remedies. The Court will rely on the State's answer in resolving any doubt concerning exhaustion of state remedies.

Moreover, a petitioner is not required to file futile applications in state courts. See Duckworth v. Serrano, 102 S.Ct. 18 (1981); Wilwording v. Swenson, 404 U.S. 249, 252 (1971); Powell v. Wyrick, 657 F.2d 222, 223-24 (8th Cir. 1981); and Rodgers v. Wyrick, 621 F.2d 921, 924 (8th Cir. 1980). In light of the South Dakota Supreme Court's position on the precise jurisdictional issue here, as stated in Stankey v. Waddel, 256 N.W.2d 117 (S.D. 1977), and more recently in State v.

confines of the Cheyenne River Indian Reservation, and on unallotted land inside that portion of the reservation opened to settlement by the Act of May 29, 1908, 35 Stat. 460. Petitioner contends that crimes committed in "Indian country," as defined in 18 U.S.C. § 1151, result in exclusive tribal or federal jurisdiction, thereby excluding state jurisdiction unless the reservation has been disestablished by congressional action. The State, however, contends that the Act of May 29, 1908 divested the tribe and federal government of jurisdiction over unalloted lands on the Cheyenne River Indian Reservation.

DISCUSSION

The jurisdictional issue involved here has been litigated extensively in both federal and state court, and has produced conflicting judicial

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Janis, ___ N.W.2d ___, No. 13237 (March 10, 1982), any effort by the petitioner to obtain relief from the State Supreme Court would be rendered futile.

opinions. In 1973, the Eighth Circuit Court of Appeals in United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973), held that the 1908 Act opening certain portions of the Cheyenne River Reservation to non-Indian settlement did not diminish the boundaries of that reservation, and the state was thus precluded from exercising its criminal jurisdiction over the Indian defendant. Six years later, the Eighth Circuit Court of appeals, in United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), relying on Erickson, reversed the district court,[2] and again held that the 1908 Act did not diminish the boundaries of the reservation. See generally Note, Jurisdictional Confusion on the Cheyenne River Indian Reservation: United States v. Dupris, 25 S.D. L. Rev. 355 (1981).

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[2] United States v. Juvenile, 453 F.Supp. 117 (D.S.D. 1978).

Prior to the Dupris decision, however, the South Dakota Supreme Court in Stankey v. Waddell, 256 N.W.2d 117 (S.D. 1977) questioned the continuing validity of Erickson, and held that the Cheyenne River Indian Reservation was diminished by the 1908 Act. Moreover, the state's high court recently reaffirmed that holding in State v. Janis, ___ N.W.2d ___, No. 13237 (March 10, 1982).

Subsequent to the Eighth Circuit Court of Appeals rules in Dupris, Dupris petitioned the United States Supreme Court for a writ of certiorari. While the petition for certiorari remained pending before the Supreme Court, the United States filed a motion to dismiss the information against Dupris. Notwithstanding the Government's motion, petitioner declined to withdraw his petition and the district court declined to rule on the government's motion pending the Supreme Court's action on the petition. The Supreme Court granted certiorari, vacated the judgment of

the Eighth Circuit, and remanded the case to the district court to consider the question of mootness.[3] Dupris v. United States, 446 U.S. 980 (1980).

On remand, the district court denied the motion to dismiss as not in the best interests of the public. United States v. Dupris, Cr. 77-30056-01 (D.S.D., May 28, 1981). The Government appeal, contending that the trial court exceeded the discretion conferred upon it by the "leave of court" language of Rule 48(a) of the Federal Rules of Criminal Procedure. The Eighth Circuit Court of Appeals concluded that the district court erred in finding that the case was not moot, and in denying the Rule 48(a) motion. Accordingly, the case was reversed and remanded, and the district court was directed to

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[3] The petitioner was convicted and sentenced prior to the Eighth Circuit Court of Appeals' ruling in Dupris. Petitioner's state post-conviction relief was denied subsequent to the Supreme Court's vacation of the judgment in Dupris.

grant the government's motion to dismiss the information against Dupris. United States v. Dupris, 664 F.2d 169 (8th Cir. 1981).

Although certiorari was granted in Dupris, and the judgment of the Eighth Circuit Court of Appeals was vacated, the Supreme Court declined to rule on the merits of the underlying jurisdictional issue. For that reason, this Court is bound by the controlling precedent established in Dupris and Erickson, wherein the Eighth Circuit Court of Appeals held that the Act of May 29, 1908 did not diminish the boundaries of the Cheyenne River Indian Reservation. Accordingly, the State of South Dakota was precluded from exercising its criminal jurisdiction over the defendant in the instant case.

For the foregoing reasons, Bartlett's petition for writ of habeas corpus is granted. The issuance of the Writ, however, is stayed for 30 days. If the State fails to file an appeal within

30 days, the Writ shall issue forthwith. If the State does file an appeal within 30 days, the stay will remain in effect pending the outcome of the appeal.

BY THE COURT:

/s/ DONALD J. PORTER
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 82-1582

John Bartlett, Appellee, v. HERMAN S. SOLEM, Warden, South Dakota State Penitentiary; and MARK V. MEIERHENRY, Attorney General, State of South Dakota, Appellants.	*	APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

Submitted: September 15, 1982

Filed: October 27, 1982

Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS, McMILLIAN, and JOHN R. GIBSON, Circuit Judges, En banc.

HEANEY, Circuit Judge, with whom LAY, Chief Judge, and BRIGHT, ROSS and JOHN R. GIBSON, Circuit Judges, join.

The United States District Court for the District of South Dakota granted John Bartlett's petition for a writ of habeas corpus on the ground that the State of South Dakota lacked jurisdiction to try Bartlett because his crime was committed on land that was part of the Cheyenne River Reservation. In so holding, the court relied on this Court's opinion in United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), vacated and remanded, 446 U.S. 980 (1980), in which we held that the Act of May 29, 1908, 35 Stat. 460, did not diminish the boundaries of the reservation established by the Act of March 2, 1889, 25 Stat. 888. See 612 F.2d at 323.

The State of South Dakota on appeal contends that Dupris is wrongly decided and asks that the Court en banc reject the panel opinion in that case. We decline to do so and affirm the decision of the district court for the reasons set forth in United States v. Dupris, supra; United

States v. Long Elk, 565 F.2d 1032 (8th Cir. 1977), and United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973).

The appellants argue that United States ex rel. Condon v. Erickson, supra, was decided before DeCoteau v. District County Court, 420 U.S. 425 (1975), and Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), and the review of the 1908 act in Condon was not complete. DeCoteau and Rosebud were thoroughly analyzed by this Court in United States v. Dupris, supra, and United States v. Long Elk, supra. We conclude that the views expressed by this Court in Condon, Long Elk and Dupris are consistent with the opinions of the Supreme Court in DeCoteau and Rosebud.

McMILLIAN, Circuit Judge, dissenting, with whom ARNOLD, Circuit Judge, joins.

I must respectfully dissent. For the reasons discussed in my dissenting opinion in United States v. Dupris, 612 F.2d 319, 323 (8th Cir.

1979), vacated and remanded, 446 U.S. 980 (1980), I would hold that the 1908 statute diminished the boundaries of the Cheyenne River Reservation. I continue to believe that the analysis in United States v. Long Elk, 565 F.2d 1032 (8th Cr. 1977), and United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973), requires modification in light of Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), and DeCoteau v. District County Court, 420 U.S. 425 (1974).

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,

EIGHTH CIRCUIT

APPENDIX C

18 U.S.C. § 1151 "Indian Country" defined:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

APPENDIX D

Act of May 29, 1908, 35 Stat. 460.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Cheyenne River and Standing Rock Indian reservations in the States of South Dakota and North Dakota lying and being within the following described boundaries, to-wit: Beginning at a point on the one hundred and second meridian of longitude west, where the township line between townships nine and ten north intersects the same; thence east on said township line to a point where the same intersects the range line between ranges twenty-four and twenty-five east of the Black Hills meridian; thence north on said range line to a point where the same intersects the township line

between townships fifteen and sixteen north; thence east along said township line to a point in the center of the main channel of the Missouri River; thence in a northerly direction along the center of the main channel of said Missouri River to a point where the township line between townships eighteen and nineteen north intersects the same, and including also entirely all islands, if any, in said river; thence west on said township line to a point where the range line between ranges twenty-two and twenty-three east intersects the same; thence north along said range line to the northwest corner of section nineteen in township twenty-one north of range twenty-three east; thence east on the section line north of sections nineteen twenty, twenty-one, twenty-two, twenty-three and twenty-four to a point where the same intersects the range line between ranges twenty-three and twenty-four east; thence

north along said range line to the State line between the States of South Dakota and North Dakota; thence west on said State line to a point where the range line between ranges eighty-four and eighty-five west in North Dakota intersects the same; thence north on said range line to a point where said range line intersects the center of the main channel of the South Fork of the Cannon Ball River; thence in a westerly direction up and along the center of the main channel of the said river to a point where the same intersects the one hundred and second meridian of longitude west; thence south along said one hundred and second meridian of longitude west; thence south along said one hundred and second meridian of longitude west to the place of beginning, except such portions thereof as have been alloted to Indians: Provided, that sections sixteen and thirty-six of the lands in each township therein shall not be disposed of, but shall be reserved for the use of the common schools of the

States of South Dakota and North Dakota, as the same may be located in the said States, respectively: Provided further, That the Secretary of the Interior may reserve such lands as he may deem necessary for agency, school, and religious purposes, to remain reserved as long as needed, and as long as agency, school, or religious institutions are maintained thereon for the benefit of said Indians: Provided, however, that the Secretary of the Interior is hereby authorized and directed to issue a patent in fee simple to the duly authorized missionary board, or other proper authority of any religious organization heretofore engaged in mission or school work on said reservations, for such lands thereon (not included in any town site herein provided for) as have been heretofore set apart to such organization for mission or school purposes.

SEC. 2. That the lands shall be disposed of by proclamation under the general provisions of the homestead and town-site laws of the United

States, and shall be opened to settlement and entry to proclamation of the President, which proclamation shall prescribe the manner in which the lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation: Provided, That prior to the said proclamation the Secretary of the Interior, in his discretion, may permit Indians who have an allotment within the area described in section one of this Act to relinquish such allotment and to receive in lieu thereof an allotment anywhere within the respective reservations thus diminished to which reservation the said Indians may belong: Provided further, That prior to the said proclamation the Secretary of the Interior shall cause allotments to be made to every man, woman, and child belonging to or holding tribal relations in said Cheyenne River and Standing Rock reservations who have not

heretofore received the allotments to which they are entitled under provisions of existing laws: Provided futher, That the Secretary of the Interior be, and he is hereby, authorized and directed to cause to be surveyed all the lands embraced within said reservations, and to cause an examination to be made of the lands by experts of the Geological Survey, and if there be found any lands bearing coal, the said Secretary is hereby authorized to reserve them from allotment or disposition until further action by Congress: Provided further, That the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish wars or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged.

SEC. 3. That the price of said lands entered as homesteads under the provisions of this Act shall be fixed by appraisement as herein provided. The President of the United States shall appoint two commissions, one for each reservation, each commission to consist of three persons to inspect, appraise, and value all of said lands that shall not have been allotted in severalty to said Indians, or reserved by the Secretary of the Interior or otherwise disposed of, and excepting sections sixteen and thirty-six in each of said townships, each commission to be constituted as follows: One resident citizen of the States of North or South Dakota, one representative of the Indian Bureau and one person holding tribal relations with one of said tribes of Indians. That within twenty days after their appointment the said commissioners so appointed for each of the said reservations, respectively, shall meet and organize by the election of one of their number as chairman. Each commission is hereby

empowered to select such clerks and assistants at such compensation as the Secretary of the Interior may approve. That said commissioners shall then proceed to personally inspect, classify, and appraise, in one hundred and sixty acre tracts each, all of the remaining lands embraced within each reservation as described in section one of this Act. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, grazing land, fourth, timber land; fifth, mineral land, if any, the mineral land not to be appraised. That said commissioners shall be paid a salary of not to exceed ten dollars per day each while actually employed in the inspection and classification of said lands and necessary expenses to be approved by the Secretary of Interior; such inspection and classification to be completed within six months from the date

of the organization of said commissions respectively, and no compensation shall be paid to either the commissioners or employees after the said six months. That when said commissions shall have completed the classification and appraisement of all of said lands the same shall be subject to the approval of the Secretary of the Interior.

SEC. 4. That the price of said lands shall be paid in accordance with the rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One fifth of the purchase price to be paid in cash at the time of entry, and the balance in five equal annual installments, to be paid in one, two, three, four, and five years, respectively, from and after the date of entry. In case any entryman fails to make the annual payments, or any of them, when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and entry canceled, and

the lands shall be reoffered for sale and entry under the provisions of the homestead law at the appraised price thereof: And provided, That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed herein, receiving credit for payments previously made. In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law, where the price of land is one dollar and twenty-five cents per acre, and when the entryman shall have complied with all the requirements and terms of the homestead laws as to settlement and residence and shall have made all the required payments aforesaid he shall be entitled to a patent for the lands entered: And provided further, That all lands remaining undisposed of at

the expiration of four years from the opening of said lands to entry may, in the discretion of the Secretary of the Interior, be reappraised in the manner provided for in this Act. And it is further provided that any lands remaining unsold after said lands have been open to entry for seven years may be sold to the highest bidder for cash without regard to the prescribed price thereof fixed under the provisions of this Act, under such rules and regulations as the Secretary of the Interior may prescribe.

SEC. 5. That the Secretary of the Interior is authorized to reserve from said lands such tracts for townsite purposes as in his opinion may be required for the future public interests, and he may cause the same to be surveyed into blocks and lots and disposed of under such regulations as he may prescribe, in accordance with section twenty-three hundred and eighty-one of the United States Revised Statutes. The net proceeds

derived from the sale of such lands shall be credited to the Indians as hereinafter provided.

Sec. 6. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the reservations aforesaid in the States of South Dakota and North Dakota the sums to which the respective tribes may be entitled, which shall draw interest at three per centum per annum; that the moneys derived from the sale of said lands and deposited in the Treasury of the United States to the credit of said Indians respectively shall be expended for their benefit under the direction of the Secretary of the Interior.

SEC. 7. That sections sixteen and thirty-six of the land in each township within the tract described in section one of this Act shall not be

subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at one dollar and twenty-five cents per acre, and the same are hereby granted to the States of South Dakota and North Dakota for such purpose as the same are located in the said States respectively; and in case any of said sections, or parts thereof, are lost to said States by reason of allotments thereof to any Indian or Indians, or otherwise, the governors of said States, respectively, with the approval of the Secretary of the Interior, are hereby authorized, within the area in the respective States described in section one of this Act, to locate other lands not occupied not exceeding two sections in any one township, which shall be paid for by the United States as herein provided, in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement.

SEC. 8. That there is hereby appropriated, out of any money in the Treasury not otherwise

appropriated, the sum of not more than two hundred and twenty-five thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the States of South Dakota and North Dakota, as provided in section seven of this Act. And there is hereby appropriated the further sum of seventy-five thousand dollars, or so much thereof as may be necessary, for the purpose of making the appraisement and classification and allotments provided for herein: Provided, That the latter appropriation, or any futher appropriation hereafter made for the purpose of carrying out the provisions of this Act, shall be reimbursed to the United States from the proceeds received from the sale of the lands described herein or from any money in the Treasury belonging to said Indian tribes respectively.

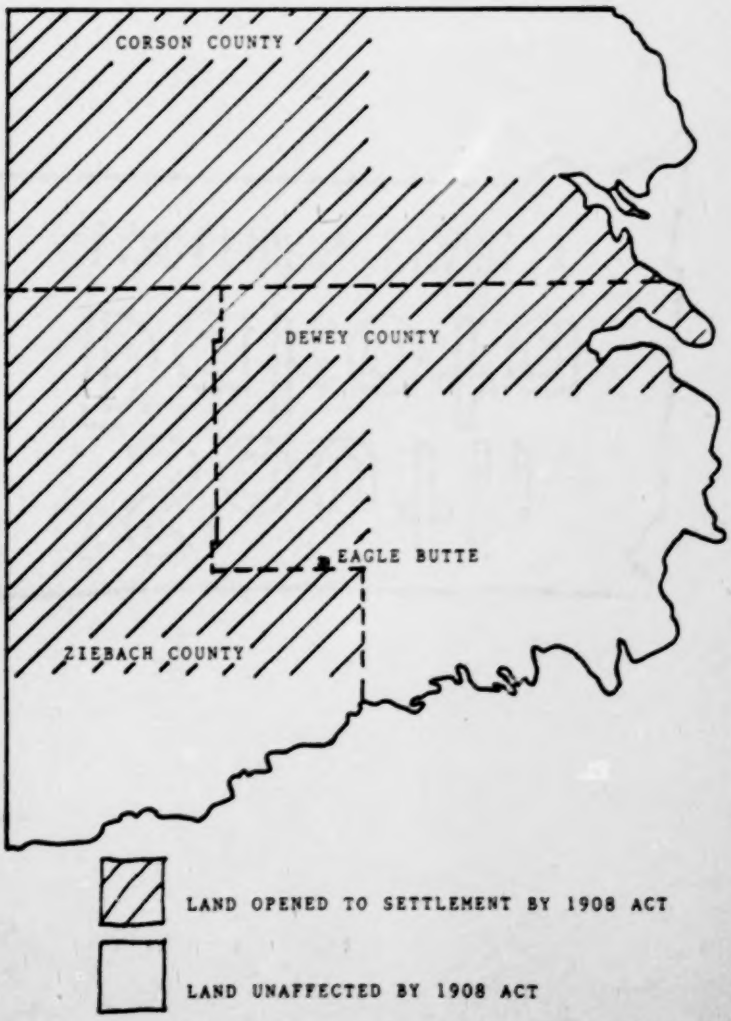
SEC. 9. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or

the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of the said lands and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided: Provided, That nothing in this Act shall be construed to deprive the said Indians of the Cheyenne River or Standing Rock Indian reservations, in South Dakota and North Dakota, of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act: Provided, That Indians residing upon their allotments in townships sixteen north of ranges twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, and thirty-one east shall have the right to use timber in said townships, except on

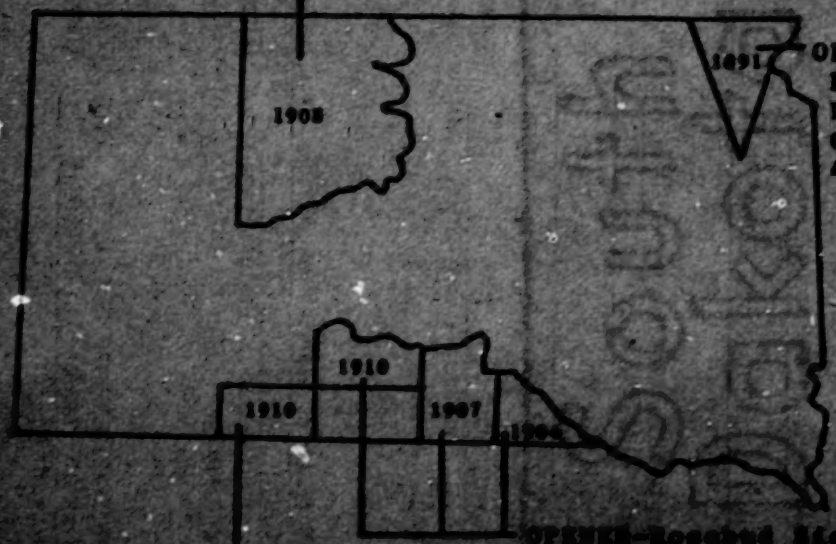
sections sixteen and thirty-six for domestic purposes only as long as the lands remain part of the public domain.

Approved, May 29, 1908.

APPENDIX E


CORSON COUNTY
DEWEY COUNTY
EAGLE BUTTE
ZIEBACH COUNTY
LAND OPENED TO SETTLEMENT BY 1908 ACT
LAND UNAFFECTED BY 1908 ACT

IN QUESTION:
STATE-South Dakota v. Janis, 317 N.W.2d 133(S.D.-1982).
FEDERAL-Bartlett v. Solem, 691 F.2d 420(8th Cir. 1982).



OPENED-
DeCoteau v.
District County
Court, 420 U.S.
425(1975).

OPENED-Rosebud Sioux Tribe v.
Kneip, 430 U.S. [illegible]

OPENED-United States ex rel. Cook v. Parsons,
525 F.2d [illegible] Cir. 1975), cert. [illegible]
430 U.S. [illegible]

APPENDIX A

15-7

APPENDIX G

FORM FOR USE IN APPLICATIONS

FOR HABEAS CORPUS UNDER 28 U.S.C. § 2254

JOHN BARTLETT
Name

19455
Prison Number

South Dakota State Penitentiary, P. O. Box 911,

Sioux Falls, South Dakota 57101
Place of Confinement

United States District Court Southern Division
District of South Dakota

Case No. _____
(To be supplied by Clerk of U.S. District Court)

JOHN DAVID BARTLETT, PETITIONER
(Full name) (Include name under which you were convicted)

V.

HERMAN SOLEM, Warden of the South Dakota State Penitentiary, RESPONDENT
(Name of Warden, Superintendent, Jailor, or authorized person having custody of petitioner)

and

THE ATTORNEY GENERAL OF THE STATE OF South Dakota, MARK V. MEIERHENRY, ADDITIONAL RESPONDENT.

(If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

INSTRUCTIONS--READ CAREFULLY

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and subscribed to under penalty of perjury as being true and correct. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form. Where more room is needed to answer any question use reverse side of sheet.

(2) Additional pages are not permitted. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5.00 your petition will be filed if it is in proper order.

(4) If you do not have the necessary filing fee, you may request permission to proceed in forma pauperis, in which event you must execute the affidavit on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed in forma pauperis, you must have an

authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds $_____, you must pay the filing fee as required by the rule of the district court.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, the original and two copies must be mailed to the Clerk of the United States District Court whose address is Clerk of Court, U.S. District Court, 400 South Phillips Avenue, Sioux Falls, South Dakota 57102.

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

1. Name and location of court which entered the judgment of conviction under attack Eighth Judicial Circuit Court, Timber Lake, South Dakota.

2. Date of judgment of conviction May 2, 1979.

3. Length of sentence Ten (10) years

   Sentencing judge Hon. Leslie R. Hersrud

4. Nature of offense or offenses for which you were convicted: Attempted Rape

5. What was your plea? (Check one)
   (a) Not guilty ( )
   (b) Guilty (x)
   (c) Nolo contendere ( )
   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

   _____
   _____
   _____
   _____

6. Kind of trial: (Check one)
   (a) Jury ( )
   (b) Judge only (x)

7. Did you testify at the trial? Yes ( ) No (x)

8. Did you appeal from the judgment of conviction? Yes ( ) No (x)

9. If you did appeal, answer the following:
   (a) Name of court _____
   (b) Result _____
   (c) Date of result _____
   If you filed a second appeal or filed a petition for certiorari in the Supreme Court, give details: _____

   _____
   _____
   _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? Yes (x) No ( )

11. If your answer to 10 was "yes", give the following information:
    (a) (1) Name of court Eighth Judicial Circuit
    (2) Nature of proceeding Post Conviction Relief
    (3) Grounds raised Questions of Law: Lack of state jurisdiction on reservation.
    (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes (x) No ( )
    (5) Result Denied.
    (6) Date of result December 1, 1981.
    (b) As to any second petition, application or motion give the same information:
    (1) Name of court _____
    (2) Nature of proceeding _____
    (3) Grounds raised _____
    (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( )
    (5) Result _____
    (6) Date of result _____

(c) As to any third petition, application or motion, give the same information:
(1) Name of court _____
(2) Nature of proceeding _____
_____
(3) Grounds raised _____
_____
_____
_____
_____
(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( )
(5) Result _____
(6) Date of result _____

(d) Did you appeal to the highest state court having jurisdiction the result of any action taken on any petition, application or motion:
(1) First petition, etc. Yes ( ) No ( )
(2) Second petition, etc. Yes ( ) No ( )
(3) Third petition, etc. Yes ( ) No ( )

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:
_____
_____
_____
_____
_____

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. As to all grounds on which

you have previously exhausted state court remedies, you should set them forth in this petition if you wish to seek federal relief. If you fail to set forth all such grounds in this petition, you may be barred from presenting them at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted all your state court remedies with respect to them. However, you should raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you select one or more of these grounds for relief, you must allege facts in support of the ground or grounds which you choose. Do not check any of the grounds listed below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendnent claim].
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which has unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: Conviction obtained by a violation of the protection against double jeopardy.
Supporting FACTS (tell your story briefly without citing cases or law): The petitioners constitutional rights have been violated by the state of South Dakota assuming jurisdiction on a matter that is alleged to be a crime wholly committed on Indian lands.

B. Ground two: _____

Supporting FACTS (tell your story briefly without citing cases or law): _____

C. Ground three: _____

Supporting FACTS (tell your story briefly without citing cases or law):

D. Ground four:

Supporting FACTS (tell your story briefly without citing cases or law):

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ( ) No (x)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing None.
(b) At arraignment and plea Raymond Kintz, Attorney at Law, Dupree, South Dakota.
(c) At trial Raymond Kintz, Attorney at Law, Dupree, South Dakota.
(d) At sentencing Raymond Kintz, Attorney at Law, Dupree, South Dakota.
(e) On appeal _____.
(f) In any post-conviction proceeding None.
(g) On appeal from any adverse ruling in a post-conviction proceeding: _____

_____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ( ) No (x)

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes ( ) No (x)
(a) If so, give name and location of court which imposed sentence to be served in the future: _____

_____
(b) And give date and length of sentence to be served in future: _____

_____
(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes ( ) No (x)

Wherefore, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 14, 1982
(Date)

/s/ John D. Bartlett
(Signature)

Signature of Attorney
(if any)

APPENDIX H

Act of April 23, 1904, 33 Stat. 254

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the said agreement be, and the same hereby is, accepted, ratified, and confirmed as herein amended and modified, as follows:

Article I. The said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County, South Dakota, described more particularly as follows: Commencing in the middle of the main channel of the Missouri River at the intersection of the south line of Brule County; thence down said middle of the main channel of said river to the intersection

of the ninety-ninth degree of west longitude from Greenwich; thence due south to the forty-third parallel of latitude; thence west along said parallel of latitude to its intersection with the tenth guide meridian; thence north along said guide meridian to its intersection with the township line between townships one hundred and one hundred and one north; thence east along said township line to the point of beginning, the unallotted land hereby ceded approximating four hundred and sixteen thousand acres, lying and being within the boundaries of Gregory County, South Dakota, as said county is at present defined and organized.

Art. II. In consideration of the land ceded, relinquished, and conveyed by article one of this agreement, the United States stipulates and agrees to dispose of the same to settlers under the provisions of the homestead and townsite laws, except sections sixteen and thirty-six, or an equivalent of two sections in each township,

and to pay to said Indians the proceeds derived from the sale of said lands; and also the United States stipulates and agrees to pay for sections sixteen and thirty-six, or an equivalent of two sections in each township, two dollars and fifty cents per acre.

Art. III. It is agreed that of the amount to be derived from the sale of said lands to be paid to said Indians, as stipulated in article two of this agreement, the sum of two hundred and fifty thousand dollars shall be expended in the purchase of stock cattle, of native range or graded Texas two-year-old heifers and graded Durham or Hereford two-year-old bulls, for issue to said Indians, to be distributed as equally as possible among men, women, and children, but not more than one half of the money received in any one year shall be expended as aforesaid, and the other half shall be paid to said Indians per capita in cash, and an accounting, settlement, and payment shall be made in the month of October in

each year until the lands are fully paid for and the funds distributed in accordance with this agreement: Provided, however, That not more than five hundred thousand dollars shall be expended or paid within two years after the ratification of this agreement, and not to exceed one hundred and fifty thousand dollars in each of the following years until the expiration of five years.

Art. IV. It is further agreed that all persons of the Rosebud Indian Reservation, South Dakota, who have been allotted lands and who are now recognized as members of the tribe belonging on said reservation, including mixed-bloods, whether their white blood comes from the paternal or maternal side, and the children born to them, shall enjoy the undisturbed and peaceable possession of their allotted lands, and shall be entitled to all the rights and privileges of the tribe enjoyed by full-blood Indians upon the reservation;

and that white men heretofore lawfully intermarried into the tribe and now living with their families upon said reservation shall have the right of residence thereon, not inconsistent with existing statutes.

Art. V. It is understood that nothing in this agreement shall be construed to deprive the said Indians of the Rosebud Reservation, South Dakota, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement."

Sec. 2. That the lands ceded to the United States under said agreement, excepting such tracts as may be reserved by the President, not exceeding three hundred and ninety-eight and sixty-seven one-hundredths acres in all, for subissue station, Indian day school, one Catholic mission, and two Congregational missions, shall be disposed of under the general provisions of the homestead and town-site laws of the United States,

and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation, until after the expiration of sixty days from the time when the same are opened to settlement and entry: Provided, That the rights of honorably discharged Union soldiers and sailors of the late civil and the Spanish war or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged: And provided further, That the price of said lands entered as homesteads under the provisions of this Act shall be as follows: Upon all land entered or filed upon within three

months after the same shall be opened for settlement and entry, four dollars per acre, to be paid as follows: One dollar per acre when entry is made; seventy-five cents per acre within two years after entry; seventy-five cents per acre within three years after entry; seventy-five cents per acre within four years after entry, and seventy-five cents per acre within six months after the expiration of five years after entry. And upon all land entered or filed upon after the expiration of three months and within six months after the same shall be opened for settlement and entry, three dollars per acre, to be paid as follows: One dollar per acre when entry is made; fifty cents per acre within two years after entry; fifty cents per acre within three years after entry; fifty cents per acre within four years after entry, and fifty cents per acre within six months after the expiration of five years after entry. After the expiration of six months after the same shall be opened for settlement and entry

the price shall be two dollars and fifty cents per acre, to be paid as follows: Seventy-five cents when entry is made; fifty cents per acre within two years after entry; fifty cents per acre within three years after entry; fifty cents per acre within four years after entry, and twenty-five cents per acre within six months after the expiration of five years after entry: Provided, That in case any entryman fails to make such payment or any of them within the time stated all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be forfeited and held for cancellation and the same shall be cancelled: And provided, That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed herein, receiving credit for payments previously made. In addition to the price to be paid for the

land, the entryman shall pay the same fees and commissions at the time of commutation or final entry, as now provided by law, where the price of the land is one dollar and twenty-five cents per acre: And provided further, That all lands herein ceded and opened to settlement under this Act, remaining undisposed of at the expiration of four years from the taking effect of this Act, shall be sold and disposed of for cash, under rules and regulations to be prescribed by the Secretary of the Interior, not more than six hundred and forty acres to any one purchaser.

Sec. 3. That the proceeds received from the sale of said lands in conformity with this Act shall be paid into the Treasury of the United States, and paid to the Rosebud Indians or expended on their account only as provided in article three of said agreement as herein amended.

Sec. 4. That sections sixteen and thirty-six of the lands hereby acquired in each township

shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose; and in case any of said sections, or parts thereof, of the land in said county of Gregory are lost to said State of South Dakota by reason of allotments thereof to any Indian or Indians, now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract herein ceded, to locate other lands not occupied not exceeding two sections in any one township, which shall be paid for by the United States as herein provided in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement.

Sec. 5. That there is hereby appropriated, out of any money in the Treasury not otherwise

appropriated, the sum of seventy-five thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of South Dakota, as provided in section four of this Act.

Sec. 6. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein; or to guarantee to find purchasers for said lands, or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided.

Approved, April 23, 1904.

APPENDIX I

Act of March 2, 1907, 35 Stat. 1240.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of all that portion of the Rosebud Indian Reservation in South Dakota lying south of the Big White River and east of range twenty-five west of the sixth principal meridian, except such portions therof as have been, or may hereafter be, alloted to Indians: Provided, That sections sixteen and thirty-six of the lands in each township shall not be disposed of, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose.

Sec. 2. That the land shall be disposed of by proclamation, under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation: Provided, That prior to the said proclamation the Secretary of the Interior, in his discretion, may permit Indians who have an allotment within the Rosebud Reservation to relinquish such allotment and to receive in lieu thereof an allotment anywhere within said reservation, and he shall also allot one hundred and sixty acres of land to each child of Indian parentage whose father or mother is or was, in case of death, a duly enrolled member of

the Sioux tribe of Indians belonging on the Rosebud Reservation who is living at the time of the passage and approval of this Act and who has not heretofore received an allotment: Provided further, That the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish wars or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged.

Sec. 3. That the price of said lands entered as homesteads under the provisions of this Act shall be as follows: Upon all land entered or filed upon within three months after the same shall be opened for settlement and entry, six dollars per acre, and upon all land entered or filed upon after the expiration of three months and within six months after the same shall have opened for settlement and entry, four dollars and

fifty cents per acre; after the expiration of six months after the same shall have been opened for settlement and entry the price shall be two dollars and fifty cents per acre. The price shall be paid in accordance with rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One-fifth of the purchase price to be paid in cash at the time of entry, and the balance in five equal annual installments, to be paid in one, two, three, four, and five years, respectively, from and after the date of entry. In case any entryman fails to make the annual payments, or any of them, promptly when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry canceled, and the lands shall be reoffered for sale and entry under the provisions of the homestead law at the same price that it was first entered: And provided, That nothing in this Act

shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed herein, receiving credit for payments previously made. In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law, where the price of the land is one dollar and twenty-five cents per acre, and when the entryman shall have complied with all the requirements and terms of the homestead laws as to settlement and residence and shall have made all the required payments aforesaid he shall be entitled to a patent for the lands entered: And provided further, that all lands remaining undisposed of at the expiration of four years from the opening of the said lands to entry shall be sold to the highest bidder for cash at not less than two dollars and fifty cents per acre, under

rules and regulations to be prescribed by the Secretary of the Interior, and that any lands remaining unsold after the said lands have been opened to entry for seven years may be sold to the highest bidder for cash, without regard to the above minimum limit of price.

Sec. 4. That the Secretary of the Interior is authorized to reserve from said lands such tracts for town-site purposes as in his opinion may be required for the future public interests, and he may cause the same to be surveyed into blocks and lots and disposed of under such regulations as he may prescribe, in accordance with section twenty-three hundred and eighty-one of the United States Revised Statutes. The net proceeds derived from the sale of such lands shall be credited to the Indians as hereinafter provided.

Sec. 5. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and

commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the Rosebud Reservation, in the State of South Dakota, the sum of one million dollars, which shall draw interest at three per centum per annum for ten years, the interest to be paid to the Indians per capita in cash annually, share and share alike; that at the expiration of ten years, after one million dollars shall have been deposited as aforesaid, the said sum shall be distributed and paid to said Indians per capita in cash; that the balance of the proceeds arising from the sale and disposition of the lands as aforesaid shall be deposited in the Treasury of the United States to the credit of said Indians and shall be expended for their benefit under the direction of the Secretary of the Interior, and he may, in his discretion, upon an application by a majority of said Indians, pay a portion of the same to the Indians in cash, per capita, share

and share alike, if in his opinion such payments will be for the best interests of said Indians.

Sec. 6. That sections sixteen and thirty-six of the lands in each township within the tract described in section one of this Act shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose; and in case any of said sections, or parts thereof, are lost to said State of South Dakota by reason of allotments thereof to any Indian or Indians, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, within the tract described herein, to locate other lands not occupied not exceeding two sections in any one township, which shall be paid for by the United States as herein provided, in quantity equal to the loss,

and such selections shall be made prior to the opening of such lands to settlement.

Sec. 7. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one hundred and sixty-five thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of South Dakota, as provided in section six of this Act. And there is hereby appropriated the further sum of fifteen thousand dollars, or so much thereof as may be necessary, for the purpose of making the allotments provided for herein: Provided, That the same shall be reimbursed to the United States from the proceeds received from the sale of the lands described herein or from any money in the Treasury belonging to said Rosebud Indians.

Sec. 8. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described,

except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided: Provided, That nothing in this Act shall be construed to deprive the said Indians of the Rosebud Reservation, in South Dakota, of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act.

Approved, March 2, 1907.

APPENDIX J

Act of May 30, 1910, 36 Stat. 448.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Rosebud Indian Reservation, in the State of South Dakota, lying and being within the counties of Mellette and Washabaugh, south of the White River, and being described and bounded as follows: Beginning at a point on the third guide meridian west where the township line between townships thirty-nine and forty intersects the same, thence north along said guide meridian to the middle of the channel of White River, thence west along the middle of the main channel of White River to the point of intersection with the line dividing the Rosebud and the Pine Ridge Indian reservations, thence south along the boundary line between said reservations to the township line separating townships

thirty-nine and forty, thence east along said township line to the place of beginning, except such portions thereof as have been or may be hereafter allotted to Indians or otherwise reserved, and except lands classified as timber lands: Provided, That any Indians to whom allotments have been made on the tract to be ceded may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof on the diminished reservation: And provided further, That the Secretary of the Interior may reserve such lands as he may deem necessary for agency, school, and religious purposes, to remain reserved as long as needed and as long as agency, school, or religious institutions are maintained thereon for the benefit of said Indians: And provided further, That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee simple to the duly authorized missionary board, or other authority,

of any religious organization heretofore engaged in mission or school work on said reservation for such lands thereon (not included in any town-site hereinafter provided for) as have heretofore been set apart to such organization for mission or school purposes.

Sec. 2. That the lands shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which the lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation: Provided, That prior to said proclamation the allotments within the portion of the said Rosebud Reservation to be disposed of as prescribed herein shall have been completed: Providedfurther, That the rights of honorably

discharged Union soldiers and sailors of the late civil and Spanish wars or Philippine insurrection as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes as amended by the Act of March first, nineteen hundred and one, shall not be abridged.

Sec. 3. That before any of the land is disposed of, as hereinafter provided, and before the State of South Dakota shall be permitted to select or locate any lands to which it may be entitled by reason of the loss of sections sixteen or thirty-six, or any portions thereof, by reason of allotments thereof to any Indian or Indians, the Secretary of the Interior is authorized to reserve from said lands such tracts for town-site purposes as in his opinion may be required for the future public interests, and he may cause same to be surveyed into lots and blocks and disposed of under such regulations as he may prescribe; and he is hereby authorized to set

apart and reserve for school, park, and other public purposes not more than ten acres in any town-site, and patents shall be issued for the lands so set apart and reserved for school, park, and other public purposes to the municipality legally charged with the care and custody of lands donated for such purposes. The purchase price of all town lots sold in town-sites, as hereinafter provided, shall be paid at such time and in such installments as the Secretary of the Interior may direct, and he shall cause not more than twenty per centum of the net proceeds arising from such sales to be set apart and expended under his direction in the construction of schoolhouses or other public buildings or in improvements within the town-sites in which such lots are located. The net proceeds derived from the sale of such lots and lands within the town-sites as aforesaid, less the amount set aside to aid in the construction of schoolhouses or other

public buildings or improvements, shall be credited to the Indians as hereinafter provided.

Sec. 4. That the price of said lands entered as homesteads under the provisions of this Act shall be fixed by appraisement, as herein provided. The President shall appoint a commission to consist of three persons to classify, appraise, and value all of said lands that shall not have been alloted in severalty to said Indians, or reserved by the Secretary of the Interior or otherwise disposed of, and excepting sections sixteen and thirty-six or other lands which may be selected in lieu thereof by the State of South Dakota, in each of said townships, said commission to be constituted as follows: One resident citizen of the State of South Dakota, one representative of the Interior Department, and one person holding tribal relations with said tribe of Indians. That within twenty days after their appointment the said commissioners shall meet and organize by the election of one of their number as

chairman. The said commissioners shall then proceed to personally inspect, classify, and appraise, in one hundred and sixty acre tracts each, all of the remaining unallotted lands embraced within that portion of the reservation described in section one of this Act. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, grazing land; fourth, timber land; fifth, mineral land, if any, but the mineral and timber lands shall not be appraised: Provided, That timber lands may be classified without regard to acreage: And provided further, That all lands classified as timber lands shall be reserved for the use of the Rosebud Indians. That said commissioners shall be paid a salary of not to exceed ten dollars per day each while actually employed in the inspection, classification and appraisement of said

lands, and necessary expenses exclusive of subsistence to be approved by the Secretary of the Interior, such inspection, classification and appraisement to be completed within six months from the date of organization of said commission.

Sec. 5. That said commission shall be governed by regulations prescribed by the Secretary of the Interior; and after the completion of the classification and appraisement of all of said lands the same shall be subject to the approval of the Secretary of the Interior.

Sec. 6. That the price of said lands disposed of under the homestead laws shall be paid in accordance with rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One-fifth of the purchase price to be paid in cash at the time of entry and the balance in five equal annual installments, to be paid in two, three, four, five, and six years, respectively, from and after the date of entry.

In case any entryman fails to make the annual payments, or any of them, when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry canceled, and the lands shall be again subject to entry under the provisions of the homestead law at the appraised price thereof: And provided, That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the appraised price, receiving credit for payments previously made. In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law where the price of land is one dollar and twenty-five cents per acre, and when the entryman shall have complied with all the requirements and terms of the homestead laws

as to settlement and residence and shall have made all the required payments aforesaid he shall be entitled to a patent for the lands entered: And provided further, That all lands remaining undisposed of at the expiration of four years from the opening of said lands to entry may, in the discretion of the Secretary of the Interior, be reappraised in the manner provided for in this Act.

Sec. 7. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the said reservation, the sums to which the said tribe may be entitled, which shall draw interest at three per centum per annum; that the moneys derived from the sale of said lands and deposited in the Treasury of the United States to the credit

of said Indians shall be at all times subject to appropriation by Congress for their education, support, and civilization.

Sec. 8. That sections sixteen and thirty-six of the land in each township within the tract described in section one of this Act shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose, and in case any of said sections, or parts thereof, are lost to said State by reason of allotments thereof to any Indian or Indians, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, within the area described in section one of this Act, to locate other lands not otherwise appropriated, which shall be paid for by the United States as herein provided, in quantity equal to the loss, and such selections shall be made prior

to the opening of such lands to settlement: Provided, That in any event not more than two sections shall be granted to the State in any one township, and lands must be selected in lieu of sections sixteen or thirty-six, or both, or any part thereof, within the township in which the loss occurs, except in any township where there may not be two sections of unallotted lands, in which event whatever is required to make two sections may be selected in any adjoining township.

Sec. 9. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of not more than one hundred and twenty-five thousand dollars, or so much therof as may be necessary, to pay for the lands granted to the State of South Dakota, as provided in section eight of this Act. And there is hereby appropriated the further sum of thirty-five thousand dollars, or so much thereof as may

be necessary, for the purpose of making the appraisement and classification provided for herein: Provided, That the latter appropriation, or any further appropriation hereafter made for the purpose of carrying out the provisions of this Act, shall be reimbursed to the United States from the proceeds received from the sale of the lands described herein or from any money in the Treasury belonging to said Indian tribe.

Sec. 10. That the lands allotted, those retained or reserved, and the surplus land sold, set aside for town-site purposes, granted to the State of South Dakota, or otherwise disposed of, shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country.

Sec. 11. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six,

or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of the said lands, and to expend and pay over the procceds received from the sale thereof only as received and as herein provided: Provided, That nothing in this Act shall be construed to deprive the said Indians of the Rosebud Indian Reservation of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act.

Approved, May 30, 1910.

APPENDIX K

Act of May 27, 1910, 36 Stat. 440.

Be it enacted by the Senate and House of Representativesof the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Pine Ridge Indian Reservation, in the State of South Dakota, lying and being in Bennett County and described as follows: Beginning at a point on the eastern boundary line of the Pine Ridge Indian Reservation, in South Dakota, where the same intersects the boundary line between the States of South Dakota and Nebraska; thence north along said eastern boundary line to the township line separating townships thirty-nine and forty; thence west along said township line to the fifth guide meridian; thence south along said fifth guide meridian to the boundary line between the said States of South Dakota and Nebraska; thence east

along said state line to the place of beginning, except such portions thereof as have been or may be hereafter allotted to Indians or otherwise reserved, and except lands classified as timber lands: Provided, That any Indians to whom allotments have been made on the tract to be ceded may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof on the diminished reservation: And provided further, That the Secretary of the Interior may reserve such lands as he may deem necessary for agency, school, and religious purposes, to remain reserved as long as needed, and as long as agency, school, or religious institutions are maintained thereon, for the benefit of said Indians: And provided further, That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee simple to the duly authorized missionary board, or other authority, of any religious organization, heretofore engaged in mission or school

work on said reservation for such lands thereon (not included in any town-site hereinafter provided for) as have heretofore been set apart to such organization for mission or school purposes.

Sec. 2. That the lands shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which the lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation: Provided, That prior to said proclamation the allotments within the portion of the said Pine Ridge Reservation to be disposed of as described herein shall have been completed: Provided further, That the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish wars or Philippine insurrection,

as defined and described in sections twenty-three and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged.

Sec. 3. That before any of the land is disposed of, as hereinafter provided, and before the State of South Dakota shall be permitted to select or locate any lands to which it may be entitled by reason of the loss of sections sixteen or thirty-six, or any portions thereof, by reason of allotments thereof to any Indian or Indians, the Secretary of the Interior is authorized to reserve from said lands such tracts for town-site purposes as in his opinion may be required for the future public interests, and he may cause same to be surveyed into lots and blocks and disposed of under such regulations as he may prescribe, in accordance with section twenty-three hundred and eighty-one of the Revised Statutes of the United States; and he is hereby

authorized to set apart and reserve for school, park, and other public purposes not more than ten acres in any town-site, and patents shall be issued for the lands so set apart and reserved for school, park, and other public purposes to the municipality legally charged with the care and custody of lands donated for such purposes. The purchase price of all town lots sold in town-sites, as hereinafter provided, shall be paid at such time and in such installments as the Secretary of the Interior may direct, and he shall cause not more than twenty per centum of the net proceeds arising from such sales to be set apart and expended under his direction in aiding the construction of schoolhouses or other public buildings or in improvements within the town-sites in which such lots are located. The net proceeds derived from the sale of such lots and lands within the town-sites as aforesaid, less the amount set aside to aid in the construction of schoolhouses or other public buildings or improvements,

shall be credited to the Indians as hereinafter provided.

Sec. 4. That the price of said lands entered as homesteads under the provisions of this Act shall be fixed by appraisement as herein provided. The President shall appoint a commission to consist of three persons to classify, appraise, and value all of said lands that shall not have been allotted in severalty to said Indians, or reserved by the Secretary of the Interior, or otherwise disposed of, and excepting sections sixteen and thirty-six or other lands which may be selected in lieu thereof by the State of South Dakota, in each of said townships, said commission to be constituted as follows: One resident citizen of the State of South Dakota, one representative of the Interior Department, and one person holding tribal relations with said tribe of Indians. That within twenty days after their appointment the said commissioners shall meet and organize by the election of one of their number as

chairman. The said commissioners shall then proceed to personally inspect, classify, and appraise, in one hundred and sixty acre tracts each, all of the remaining unallotted lands embraced within that portion of the reservation described in section one of this Act. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, grazing land; fourth, timber land; fifth, mineral land, if any, but the mineral and timber lands shall not be appraised: Provided, That timber lands shall be classified without regard to acreage: And provided further, That all lands classified as timber lands shall be reserved for the use of the Pine Ridge Indians. That said commissioners shall be paid a salary of not to exceed ten dollars per day each while actually employed in the inspection, classification and

appraisement of said lands, and necessary expenses exclusive of subsistence to be approved by the Secretary of the Interior, such inspection, classification and appraisement to be completed within six months from the date of organization of said commission.

Sec. 5. That said commission shall be governed by regulations prescribed by the Secretary of the Interior, and after the completion of the classification and appraisement of all of said land the same shall be subject to the approval of the Secretary of the Interior.

Sec. 6. That the price of said lands disposed of under the homestead laws shall be paid in accordance with rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One-fifth of the purchase price to be paid in cash at the time of entry, and the balance in five equal annual installments, to be paid in two, three, four, five, and six years,

respectively, from and after the date of entry. In case any entryman fails to make the annual payments, or any of them, when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry canceled, and the lands shall be again subject to entry under the provisions of the homestead law at the appraised price thereof: Provided, That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the appraised price, receiving credit for payments previously made. In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law where the price of land is one dollar and twenty-five cents per acre, and when the entryman shall have complied with all the

requirements and terms of the homestead laws as to settlement and residence and shall have made all the required payments aforesaid he shall be entitled to a patent for the lands entered: And provided further, That all lands remaining undisposed of at the expiration of four years from the opening of said lands to entry may, in the discretion of the Secretary of the Interior, be reappraised in the manner provided for in this Act.

Sec. 7. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the said reservation, the sums to which the said tribe may be entitled, which shall draw interest at three per centum per annum; that the moneys derived from the sale of said lands and deposited in the Treasury of the United States to the credit

of the said Indians shall be at all times subject to appropriation by Congress for their education, support, and civilization.

Sec. 8. That sections sixteen and thirty-six of the land in each township within the tract described in section one of this Act shall not be subject to entry, but shall be reserved for the use of the common schools, and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose, and in case any of said sections, or parts thereof, are lost to said State by reason of allotments thereof to any Indian or Indians, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, within the area described in section one of this Act, to locate other lands not otherwise appropriated, which shall be paid for by the United States as herein provided, in quantity equal to the loss, and such selections shall be made prior

to the opening of such lands to settlement: Provided, That in any event not more than two sections shall be granted to the State in any one township, and lands must be selected in lieu of sections sixteen or thirty-six, or both, or any part thereof, within the townships in which the loss occurs, except in any townships where there may not be two sections of unallotted lands, in which event whatever is required to make two sections may be selected in any adjoining township.

Sec. 9. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of not more than one hundred and twenty-five thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of South Dakota, as provided in section eight of this Act. And there is hereby appropriated the further sum of thirty-five thousand dollars, or so much thereof as may

be necessary, for the purpose of making the appraisement, classification, and allotment provided for herein: Provided, That the latter appropriation, or any further appropriation hereafter made for the purpose of carrying out the provisions of this Act, shall be reimbursed to the United States from the proceeds from the sale of the lands described herein or from any money in the Treasury belonging to said Indian tribe.

Sec. 10. That the lands allotted, those retained or reserved, and the surplus land sold, set aside for town-site purposes, granted to the State of South Dakota, or otherwise disposed of, shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country.

Sec. 11. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described,

except sections sixteen and thirty-six, or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of the said lands, and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided: Provided, That nothing in this Act shall be construed to deprive the said Indians of the Pine Ridge Indian Reservation of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act.

Approved, May 27, 1910.

APPENDIX L

Act of February 17, 1910, 36 Stat 196.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section seven and eight of the Act of May twenty-ninth, nineteen hundred and eight, entitled "An Act to authorize the sale and disposition of a portion of the surplus and unallotted lands in the Cheyenne River and Standing Rock Indian reservations in the States of South Dakota and North Dakota, and making appropriation and provision to carry the same into effect," are amended and as so amended are reenacted to read as follows:

Sec.7. That sections sixteen and thirty-six of the land in each township within the tract described in section one of this Act shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per

acre, and the same are hereby granted to the States of South Dakota and North Dakota for such purpose as the same are located in the said States, respectively; and in case any of said sections, or parts thereof, are lost to said States by reason of allotments thereof to any Indian or Indians, or otherwise, the governors of said States, respectively, with the approval of the Secretary of the Interior, are hereby authorized, within the area in the respective States described in section one of this Act, to locate other lands not occupied not exceeding two sections in any one township, which shall be paid for by the United States as herein provided, in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement.

Sec. 8. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of not more than four hundred and fifteen thousand dollars, or so much

thereof as may be necessary, to pay for the lands granted to the States of South Dakota and North Dakota, as provided in section seven of this Act. And there is hereby appropriated the further sum of seventy-five thousand dollars, or so much thereof as may be necessary, for the purpose of making the appraisement and classification and allotments provided for herein: Provided, That the latter appropriation, or any further appropriation hereafter made for the purpose of carrying out the provisions of this Act, shall be reimbursed to the United States from the proceeds received from the sale of the lands described herein or from any money in the Treasury belonging to said Indian tribes, respectively: And provided further, That the lands allotted, those retained or reserved, and the surplus lands sold, set aside for town-site purposes, or granted to the said States, or otherwise disposed of under the provisions of this Act, shall be subject for a period of twenty-five years to all the laws of the

United States prohibiting the introduction of intoxicants into the Indian country.

Approved, February 17, 1910.

APPENDIX M

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

JOHN BARTLETT,	)	CIV. NO. 82-3009
	)	
Petitioner,	)	
	)	
v.	)	ORDER
	)	
HERMAN S. SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, AND MARK V. MEIERHENRY, ATTORNEY GENERAL, STATE OF SOUTH DAKOTA,	)	
	)	
Respondents.	)	

Upon the evidence and records on file, and for the reasons stated in the Court's memorandum opinion filed this date, it is

ORDERED that a writ of habeas corpus shall issue to respondents commanding the release of petitioner; this Order is stayed for thirty (30) days during which time respondents may file an

appeal, and if in fact an appeal is filed, this Order shall be further stayed pending the outcome of that appeal.

Dated April 19, 1982.

BY THE COURT:

/s/ DONALD J. PORTER
UNITED STATES DISTRICT JUDGE

ATTEST:

WILLIAM F. CLAYTON, CLERK

BY: /s/ JUDY L. HARVEY
Deputy

(SEAL OF COURT)

APPENDIX N

UNITED STATES DISTRICT COURT

FOR THE EIGHTH CIRCUIT

NO. 82-1582-SD JOHN BARTLETT, Appellee, v. HERMAN S. SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, ET AL., Appellants.	)	SEPTEMBER TERM, 1982 JUDGMENT

This appeal from the United States District Court for the ----------District of South Dakota was considered on a designated record from the United States District Court and on briefs of the respective parties and was argued by counsel.

After consideration, it is order and adjudged that the judgment of the said District Court in

this cause be, and the same is hereby, affirmed in accordance with the opinion of this Court.

October 27, 1982

A True Copy:

ATTEST: Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit